

**BOULT
CUMMINGS
CONNERS
& BERRY**

LAW OFFICES
414 UNION STREET, SUITE 1600
POST OFFICE BOX 198062
NASHVILLE, TENNESSEE 37219

HENRY WALKER
(615) 252-2363
Fax: (615) 252-6363
Email: hwalker@bccb.com

TELEPHONE (615) 244-2582
FACSIMILE (615) 252-2380
INTERNET WEB <http://www.bccb.com/>

January 18, 2000

K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: PETITION OF NEXTLINK TENNESSEE, L.L.C. FOR ARBITRATION
OF AN INTERCONNECTION AGREEMENT WITH BELL SOUTH
TELECOMMUNICATIONS, INC.
DOCKET NO. 98-00123

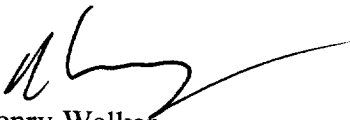
Dear David:

Enclosed please find an original and thirteen (13) copies of NEXTLINK's brief in response to BellSouth's motion in the above-captioned proceeding. Copies have been forwarded to BellSouth Telecommunications.

NEXTLINK asks that this matter be placed on the Tennessee Regulatory Authority's next available agenda, either January 25, or February 1.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC



Henry Walker

HW/nl
Enclosures

FILE

BEFORE THE TENNESSEE REGULATORY AUTHORITY

**IN RE: PETITION OF NEXTLINK TENNESSEE, L.L.C. FOR ARBITRATION OF
AN INTERCONNECTION AGREEMENT WITH BELL SOUTH
TELECOMMUNICATIONS, INC.**

DOCKET NO. 98-00123

**NEXTLINK'S BRIEF IN RESPONSE TO BELL SOUTH'S
MOTION TO REJECT PROVISIONS OF ARBITRATION AGREEMENT**

INTRODUCTION

On November 5, 1999, NEXTLINK Tennessee, Inc. ("NEXTLINK") and BellSouth Telecommunications, Inc., ("BellSouth") jointly petitioned the Tennessee Regulatory Authority ("TRA") to approve an interconnection agreement between the parties.

Shortly before the TRA was scheduled to consider and, presumably, approve the unopposed petition, BellSouth filed a motion asking the agency to reject two provisions of the agreement: one relating to reciprocal compensation for ISP traffic and the other relating to Multiple Tandem Access.¹ BellSouth asks further that the parties be directed to renegotiate those two provisions and resubmit them to the Authority.

Upon receiving the motion and NEXTLINK's response, the Authority postponed action on the petition to allow the parties further opportunity to resolve the disputed provisions

¹ Multiple Tandem Access simply means that NEXTLINK is not required to have a separate, physical connection to each BellSouth tandem but can reach every tandem, if necessary, through a single connection.

of the agreement or, in the alternative, to file additional briefs and submit the matter to the Authority for decision.

The parties have been unable to resolve their differences over the disputed provisions. NEXTLINK therefore submits this brief in opposition to BellSouth's motion and asks the Authority to approve the interconnection agreement as originally filed.

ARGUMENT

I. Having previously petitioned the TRA to approve the agreement as filed, BellSouth cannot now ask the Authority to reject portions of that agreement.

The equitable doctrine of judicial estoppel, well recognized in Tennessee, prohibits a party from taking inconsistent positions during the same proceeding. Quoting from *Corpus Juris Secundum*, the Tennessee Court of Appeals explained:

The rule is well established that during the course of litigation a party is not permitted to assume or occupy inconsistent and contradictory positions, and while this rule is frequently referred to as 'judicial estoppel', it more properly is a rule which estops a party to play fast-and-loose with the courts.

Cothron v. Scott, 446 S.W. 2d 533, 535-536 (Tenn. App. 1969).

This doctrine has also been applied in a regulatory context. In South Central Bell v. Tenn. Public Serv. Comm., 675 S.W.2d 718 (Tenn. App. 1984), the Court of Appeals held that BellSouth, having offered to place temporary rates in effect, under bond and subject to refund, could not later refuse to make such a refund on the grounds that the Commission had no authority to accept BellSouth's offer. The Court reasoned that, since BellSouth had voluntarily proposed the arrangement and had benefitted from it, BellSouth was estopped from arguing later that the arrangement was illegal. *Id.* at 720.

Similarly, BellSouth in this case agreed to the contract language and joined NEXTLINK in petitioning the TRA to approve the agreement as written. As in any negotiated agreement, the entire contract is the product of give-and-take negotiations. Either party might

prefer changes in some sections of the agreement. Both parties, however, apparently decided that the agreement, taken as a whole, was satisfactory.² Both parties will receive advantages and disadvantages under the agreement. Having voluntarily agreed to the entire contract, portions of which will work to BellSouth's advantage, BellSouth is now estopped from challenging other provisions of the contract which, BellSouth believes, favor NEXTLINK.

II. BellSouth's attempt to re-litigate the reciprocal compensation issue is procedurally inappropriate and legally unfounded.

Procedurally, BellSouth has no basis --- and does not suggest any in the company's motion --- upon which to re-argue the reciprocal compensation question. This issue has been fully argued to the agency in this and other proceedings. Last spring, the TRA issued a final order ruling in favor of NEXTLINK's position. The time for reconsideration of that Order has long since passed.

Legally, BellSouth's invocation of the FCC's Declaratory Ruling³ has no bearing on the correctness of the agency's decision. As BellSouth concedes (BellSouth brief at 4 and at footnote 1), the FCC explicitly authorized state commissions to regulate ISP-bound traffic in an

²BellSouth states in an affidavit that they were, at first, unaware of the disputed language regarding Multiple Tandem Access but, later, decided not to raise the issue with the TRA in the hope that the matter could be resolved. NEXTLINK disputes BellSouth's recollection of some of the events surrounding their dispute. There is no dispute, however, that BellSouth was aware of the Multiple Tandem Access provision in the agreement at the time of the filing of the joint petition.

³ Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, 3697 ¶ 12 (Feb. 26, 1999) ("Declaratory Ruling").

arbitration proceeding and to order the payment of reciprocal compensation for ISP traffic, at least until the FCC itself addressed the issue. In other words, the Ruling affirmed the TRA's power to rule as it did in the NEXTLINK arbitration. BellSouth simply disagrees with the FCC's decision. See BellSouth brief at footnote 1.

III. Having failed to raise the Multiple Tandem Access issue in the company's response to NEXTLINK's arbitration petition, BellSouth is barred by federal law from arbitrating the issue now. In any event, BellSouth's claims that Multiple Tandem Access is (1) technically infeasible and (2) contrary to BellSouth's federal and state tariffs, have no merit.

These proceedings began when NEXTLINK, acting pursuant to Section 252 of the federal Telecommunications Act of 1996, petitioned the TRA to arbitrate an interconnection agreement between NEXTLINK and BellSouth. The Act provides, however, that state arbitrators "shall limit [their] consideration" to those issues raised in the arbitration petition and the response to the petition. 47 U.S.C. § 252 (b)(4)(A). (BellSouth itself has invoked this restriction to prohibit ICG from litigating an issue not explicitly raised in ICG's petition. See the Pre-Arbitration Order defining the issues in Docket 99-00377.)

Since neither BellSouth nor NEXTLINK raised the Multiple Tandem Access issue in the arbitration petition or the response to the petition, BellSouth cannot litigate that issue in this proceeding.

In any event, BellSouth's arguments on the merits of this issue are not persuasive.

Based on an affidavit attached to BellSouth's motion, the company contends that Multiple Tandem Access will degrade the quality of service and "is not technically feasible."

BellSouth brief, at 6. NEXTLINK disputes that assertion and will, if requested, submit evidence to effect. It is not necessary, however, for the TRA to decide at this time which parties' claims are accurate.

The Interconnection agreement between the parties filed by BellSouth and NEXTLINK provides (Attachment 3, page 7, section 3.9), "Each of the following trunking options [including Multiple Tandem Access] shall be available at NEXTLINK's option, unless BellSouth demonstrates, consistent with objectively engineering standards, that such arrangement is not technically feasible." Emphasis added.

In other words, the interconnection agreement itself provides that, if BellSouth can prove its claims, "consistent with objectively verifiable engineering standards," BellSouth is not required to provide Multiple Tandem Access.

Since the agreement already provides a mechanism for the resolution of such engineering disputes, the TRA should approve the agreement as written and direct the parties to address any engineering problems that may arise in a manner that is consistent with the language of the contract.

Finally, BellSouth argues that the provision for Multiple Tandem Access is inconsistent with BellSouth's interstate and intrastate tariffs and therefore should not be included in the interconnection agreement.

This argument is specious. The whole purpose of an arbitration is to fix terms and conditions which are not found in BellSouth's tariffs. Otherwise, there would be no need to conduct an arbitration proceeding in the first place.

Under the federal Act, the TRA is granted the power to arbitrate interconnection contracts in conformity with Section 252. That authority overrides anything in the parties' tariffs. BellSouth, until now, has never suggested otherwise.

For example, BellSouth's tariffs do not offer unbundled network elements, extended loops, or line-sharing. The TRA, however, may order all of these as part of an interconnection agreement. Furthermore, BellSouth's federal and state tariffs strictly limit the carrier's liability for service interruptions. But the TRA may include liquidated damages in an interconnection agreement and enforce those provisions against BellSouth.

It is irrelevant whether or not the provision in the agreement concerning Multiple Tandem Access is consistent with BellSouth's tariffs. The only genuine controversy is whether, under the dispute resolution provision of the agreement, BellSouth can "objectively" demonstrate that Multi Tandem Access is not technically feasible. This is a matter to be addressed, if at all, in the context of an enforcement proceeding. It is not an issue that needs to be resolved in deciding whether to approve the agreement in the first place.

CONCLUSION

For these reasons, the TRA should deny BellSouth's motion and approve the agreement as filed, as originally requested by the parties.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker

414 Union Street, Suite 1600

P.O. Box 198062

Nashville, Tennessee 37219

(615) 252-2363

Dana Shaffer


NEXTLINK Tennessee, Inc.

105 Molloy Street

Nashville, Tennessee 37201

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been forwarded to Guy Hicks, Esq., BellSouth Telecommunications, Inc., 333 Commerce Street, Nashville, TN 37201, via first-class mail, this the 18th day of January, 2000.



Henry Walker